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RE MARGARET MARY NASHATARAM GP GOMEZ EX P ARAB MALAYSIAN FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D5-29-3755-1999]
b 15 MAY 2002

BANKRUPTCY: *Notice - Setting aside - Setting aside of bankruptcy notice and order - Whether valid judgment obtained against debtor - Failure to produce office copy of judgment order - Whether contravened r. 92 of* c *Bankruptcy Rules - Whether fatal - Alleged illegality in judgment - Whether court at liberty to examine and go behind judgment - Bankruptcy Act 1967, s. 3(2) - Bankruptcy Rules 1969, r. 92*

The judgment creditor in this case ('the JC') had granted a loan to a borrower upon the security of a charge. The borrower defaulted and the JC obtained an d order for sale of the charged land. Subsequently, however, the JC entered into a settlement agreement with the borrower and allowed the latter to redeem the land. The settlement agreement, inter alia, was guaranteed by the judgment debtor ('the JD') who agreed to pay the JC part of the settlement sum in case of default. The borrower defaulted, and the JC hence sued the JD and obtained e summary judgment for the sum guaranteed ('the judgment'). Thereafter, the JC instituted bankruptcy proceeding against the JD, and in consequence, a bankruptcy notice and a bankruptcy order were issued against the JD. The JD applied to set aside the said notice and order, but the applications were dismissed by the learned registrar. The JD appealed. Before the learned judge, f issues were raised as to: (i) whether the bankruptcy notice had contravened r. 92, Bankruptcy Rules 1969 ('the Rules'), and if so whether the same could be set aside by reason thereof; and (ii) whether the court, in dealing with the appeal respecting the bankruptcy order, could go behind the judgment and examine the legality or otherwise of the settlement agreement.

g **Held:**

[1] Rule 92 of the Rules serves the purpose of providing the registrar with the means to verify the existence of a judgment and to satisfy him that it was in order to issue the bankruptcy notice. He is bound to issue the h bankruptcy notice if he is satisfied that the JC had obtained a judgment sum of the statutory minimum sufficient to issue a bankruptcy notice. (p 942 e-f)

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[2] Once the registrar issues a bankruptcy notice the JD may only apply to set aside the notice by showing that no such judgment order has been made against him. The JD is not entitled to have the judgment notice set aside merely by pointing to some procedural defects in the application or in the issuance of the notice. (p 942 h-i)

[3] A bankruptcy court is least equipped by the summary nature of the proceedings to conduct a detailed inquiry into the propriety of the judgment obtained against the JD beyond satisfying itself that, *prima facie*, that judgment was regular. The task of challenging the legality of the judgment should be undertaken in another forum by an application to set aside the same. (p 944 c-d)

[4] The judgment that was entered against the JD here was obtained after a hearing under O. 14 and was perfectly regular in all respects. The judgment was obtained on merit and was not obtained by fraud, collusion or through a miscarriage of justice. Likewise, there was nothing illegal about the settlement agreement that was entered into between the borrower and the JC. In the circumstances, this court would not look beyond that agreement to determine whether there were elements of illegality therein which would enable the JD to avoid her obligations under the guarantee. (pp 943 g & 944 a-b)

[Appeals dismissed.]

Case(s) referred to:

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(foll)***

Legislation referred to:

Bankruptcy Rules 1969, r. 92
Rules of the High Court 1980, O. 14

For the appellant/judgment debtor - Murthi (Ranjan Chandran); M/s Ranjan Chitravathy & Co
For the respondent/judgment creditor - Joy Appukuttan; M/s SK Yeoh & Partners

Reported by WA Sharif

JUDGMENT

Kang Hwee Gee J:

Enclosure 26 application – is an appeal against registrar's decision disallowing JD's to set aside bankruptcy notice.

Enclosure 25 – is an appeal against registrar's decision disallowing JD's application to set aside bankruptcy order.

The appeal in encl. 25 also contains a prayer for a declaration that the JD had not committed an act of bankruptcy.

The two appeals (encl. 26 and encl. 25) were heard together.

The bankruptcy order arose from a debt arising from a summary judgment under O. 14 Rules of the High Court 1980 entered against the JD in Civil Suit D3-22-3570-1998. The JD did not appeal on the said judgment.

The debt came to be owed to the JC in the following manner:

One Marka Holdings Sdn. Bhd. had owed the JC a certain sum of money. The JC and Marka then decided to enter into a settlement agreement for the lesser sum.

In consideration of the JC agreeing to the settlement, the JD executed a letter of guarantee dated 27 July 1996 wherein the JD had jointly and severally with another person agreed to pay the JC part of the settlement sum on demand in the event Marka defaulted on the settlement.

Marka then defaulted on the settlement – hence the institution of civil suit against the JD and in consequence the summary judgment.

To save myself of the arduous task of having to summarise the arguments of the parties in these appeals, I propose instead to reproduce the relevant paragraphs of the written submission of each party *verbatim*.

The background and the grounds of the JD's application can then be gleaned from the submissions.

The relevant paragraphs of the JD's submission

> 2. **Reason: 1 – Bankruptcy Notice Invalid**
>
> 2.1 The Judgment Debtor humbly submits that the said Bankruptcy Notice is invalid since there is a substantive flaw based on the following reasons appended below:
>
> 2.2 Firstly it is apparent that no office copy of the Order made by the High Court of Kuala Lumpur dated 27th April 1999 was ever produced when the Judgment Creditor had served the request for the issue of Bankruptcy Notice.
>
> Case: *American Express International INC v. Held*
> Federal Court of Australia Volume 168 Australian Law Reports page 185 (refer case No. 2 Bundle of Authorities) the Judgment of Justice Kenny.

PRINCIPLE: The Court held that the failure to attach a copy of the Judgment when the Bankruptcy Notice was served on the Judgment Debtor was a failure to comply with an essential requirement of the Act as the identification of the relevant Judgment is an essential element in establishing an adequate foundation for the Bankruptcy Notice. It was further held that the defect in the notice was of such a kind as could reasonably mislead the Debtor so that it was not a formal defect that could be validated.

2.3 In this regard the Judgment Debtor will further like to make particular reference to the local authority of *Raman Cheetiar v. Ledchumanan Cheetiar* [1939] MLJ page 200 (Refer Case No: 3 Bundle of Authorities).

PRINCIPLE: The Court held that the omission to produce the office copy of the Judgment when the request for the issue of the Bankruptcy Notice was made was a defect which could not be cured by Section 123 of the Bankruptcy Enactment or Rule 91 of the Bankruptcy Rules.

2.4 Further our Bankruptcy Act 1967 Section 3(2) is very clear that "a Bankruptcy Notice under this Act shall be in the prescribed form ..." Reference is also made to Form No: 5 to the appendix of the Bankruptcy Rules.

2.5 Secondly the Judgment Debtor humbly submits that the said Bankruptcy Notice is invalid since the purported certified copy of the Judgment dated 27th April 1999 obtained by the Judgment Creditor is inadmissible because it was not certified in accordance with Section 76 of the Evidence Act 1950.

Case: *Noliana bte Sulaiman v. Public Prosecutor* [2001] 1 CLJ 36 (refer case No. 4 Bundle of Authorities) Augustine Paul J.

Principle: At Held 4 (b) the Court said that the certified copies under Section 76 must contain a certificate, written at the foot of the copy, certifying that it is a true copy of the document or part thereof, as the case may be. The requirements of a certificate under Section 76 are mandatory. At Held 4 (c):

> the Court said that a certificate which states "Salinan Diakui Sah" was not in compliance with Section 76 as the Section requires the certificate to state "that it is a true copy of the document or part thereof ... .

2.6 It is pertinent to note here that the Court of Appeal has recently in the case of *J Raju a/1 M Kerpaya v. Commerce International Merchant Bankers Berhad* [2000] 3 CLJ 104 (refer case No. 5 Bundle of Authorities) Gopal Sri Ram JCA held that when determining an issue under the Bankruptcy Act it is incumbent upon the court to accord its provisions a strict construction.

3. **Reason: 2 – The Principal Agreement/Transaction Between The Borrower And Lender Is Tainted With Illegality**

3.1 The Judgment Debtor would like to impress upon this Honourable Court that the principal transaction was between a company called Marka Holdings Sdn. Bhd. ("the Borrower/Chargor") and Central Malaysia Finance Bhd. ("the Lender/Chargee").

3.2 The Chargee granted the borrower a loan for the sum of RM2,900,000.00 together with interest at the rate of 13% per annum.

3.3 The terms of the said agreement are as expressly stipulated in the annexure to the said charge (Refer: Exhibit MMN-1 Enclosure 18).

3.4 The Judgment Debtor wishes to highlight to this Honourable Court that the said charge between the Chargor and Chargee was registered at the Registry of Land Titles Penang on the 24th February 1981.

3.5 When the Chargor/Borrower defaulted in the repayment of the said Loan, the Chargee applied for an order for sale of the said Land pursuant to the National Land Code 1965.

3.6 An order for sale of the said Land was obtained on the 19th June 1986 at the Kuala Lumpur High Court Originating Summons No.: F185 of 1985. (Refer: Exhibit MMN-2 Enclosure 18).

3.7 The Judgment Creditor above subsequently became the successor in title of First Malaysia Finance Bhd.

3.8 On the 15th October 1993 the Judgment Creditor as chargee obtained an order to sell the said land of the chargor by public auction since there was an amount due and owing by the chargor/borrower of more than RM5,500,000.00.

4. **The Judgment Creditor Was Duty Bound To Proceed With The Public Auction**

4.1 It is the Judgment Debtor's humble submission that the Judgment Creditor was duty bound to strictly adhere to the provisions of the National Land Code and to proceed with the public auction to sell the said land of the Chargor since an order for sale was obtained.

4.2 In this regard the Judgment Debtor will make reference to the High Court case of *Bank Pertanian Malaysia v. Baka @ Ismail Pelan* [1999] 1 AMR page 228 the decision of Justice Augustine Paul (Refer case No. 6 Bundle of Authorities).

PRINCIPLE: This case had a similar factual scenario as in our case where an order for sale was obtained and subsequently due to the negotiations being reached, the foreclosure proceedings were withdrawn. The Court held as follows:

> Unless there is payment of the full amount due as prescribed by Section 266 of the National Land Code the order for sale cannot cease to be effective. The scheme of rescheduled payment negotiated by the parties in this case was contrary to the mode of payment contemplated by Section 266 of the National Land Code. It amounted to an attempt to contract out of the National Land Code and could not be given effect.

4.3 The landmark case on the principle that parties cannot contract out of the provisions of the National Land Code is the Federal Court case of *Kimlin Housing Development Sdn. Bhd. (Penerima dan Pengurus dilantik) (dalam Liquidasi) v. Bank Bumiputra Malaysia Berhad & 3 Ors. Supreme Court* [1997] 3 AMR 2361 (refer case No. 7 Bundle of Authorities) Edgar Joseph Jr FCJ.

PRINCIPLE: The Court at Held 1(d) said that the provisions of the code setting out the rights and remedies of parties under a statutory charge over land are exhaustive and exclusive and any attempt at contracting out of those rights, unless expressly provided for in the code, would be void and contrary to public policy.

4.4 In actual fact even before the decision of *Kimlin* the High Court as early as 1994 in the decision of *United Malayan Banking Corp Bhd. v. Chong Bun Sun @ Chang Bun Sun* [1994] 2 AMR page 29 (refer case No. 8 Bundle of Authorities) has held that there can be no sale by way of a private treaty once an order for sale has been obtained.

Principle: Justice Visu Sinadurai at held (e) said as follows:

> There is no express provision in the code enabling the Court to order a sale by private treaty.

Principle: At held (f) the Learned Judge said as follows:

> Once an order for sale (by Public Auction) has been made by the Court under Section 257 of the code, the Court does not have the power to make a subsequent order to vary or set aside the earlier order, and to make a new order that the charged property be sold by way of private treaty.

5. **The Judgment Creditor In Our Case Has Proceeded By Way Of A Separate Agreement And A Sale By Private Treaty**

5.1 The Judgment Creditor in the present case has proceeded to recover the amounts due and outstanding from the Chargor/Borrower by entering into a separate agreement with the Borrower to sell the said land by private treaty (Refer Exhibit MMN-3 Enclosure 18)

5.2 It is submitted that this is in clear contravention of the provisions of the National Land Code and the case of *Bank Pertanian Malaysia* and *Kimlin*s case referred to earlier.

5.3 This separate agreement is revealed from a reading of the letters exhibited as Exhibit MMN-3 in Enclosure 18 the contents of which are as follows:

(a) The Judgment Creditor allowed the Borrower/Chargor to redeem the said Land for RM2,100,000.00.

(b) The Borrower was allowed to sell the said Land to Murni Plastics Sdn. Bhd. (Purchaser) for RM1,500,000.00.

(c) The redemption figure of RM2,100,000.00 was to be paid to the Judgment Creditor in the following manner:

(i) RM1,500,000.00 by the Purchaser

(ii) RM100,000.00 by the Borrower

(iii) RM500,000.00 by way of corporate Guarantee by the Purchaser and the personal guarantee of Ms Thilagavathy a/p Kumarasamy and Margaret Mary Nashataram a/p G.P. Gomez the Judgment Debtor in the present Bankruptcy Suit.

6. **A Guarantee Was Executed By The Judgment Debtor Above Based On This Separate Agreement Entered**

6.1 The Judgment Debtor humbly submits that she had executed a guarantee dated 27th July 1996 which was the subject matter of Civil Suit D3-22-3570-1998 as a result of this separate agreement. (Refer Exhibit MMN-4 Enclosure 18.)

6.2 However it is pertinent to note that the Guarantee document does not disclose the fact that an order for sale was obtained by the chargee/ Judgment Creditor earlier. Accordingly this private settlement agreement is in contravention of the provisions of the National Land Code and not within the knowledge and contemplation of the Judgment Debtor/ Guarantor.

7. **The Position In Law – Principal Transaction Between The Judgment Creditor And Borrower Is Illegal And Void**

7.1 As submitted earlier the principal transaction between the Judgment Creditor and borrower is void and illegal for contravention of the provisions of the National Land Code (Reference is made to the *Bank Pertanian* case and *Kimlin*'s case earlier).

7.2 It is submitted that it was illegal for the Judgment Creditor/chargee to enter into a separate agreement with the borrower when they had originally subjected themselves to the provisions of the National Land Code to sell the said land by way of a public auction and did in actual fact obtain an order for sale to this effect subsequently.

7.3 Further the actions of the Judgment Creditor is in clear breach of Section 24 of the Contracts Act 1950.

8. **The Guarantee Executed By The Judgment Debtor Is Accordingly Void Since The Principal Transaction Between The Judgment Creditor/Chargee And Borrower/Chargor Is Illegal**

8.1 Accordingly it must follow that if the principal transaction is illegal then the Guarantee has no leg to stand and is therefore bad in law.

8.2 There is therefore no basis whatsoever for the Judgment Creditor to commence Bankruptcy Proceedings as against the Judgment Debtor.

8.3 Reference is made to the case of *Government of Malaysia v. Gurcharan Singh & Ors* [1971] 1 MLJ page 211 (Refer case No. 9 Bundle of Authorities).

PRINCIPLE: At Held 2 it was held that if the principle debtor was found to be not liable then the surety will also be not liable since the liability was co-extensive with that of the principle debtor.

9. **Admission By Judgment Creditor That There Was A Separate Agreement With Borrower**

9.1 The Judgment Debtor will make reference to the Affidavit In Reply filed by the Judgment Creditor affirmed by Seow Swee Eng on 27th June 2001 at paragraph 8 where it is admitted that there was indeed a settlement letter between the Judgment Creditor and the borrower.

9.2 Therefore in view of this admission, the Judgment Creditor must necessarily agree that they were in clear contravention of the National Land Code since they did not proceed by way of a public auction after they had obtained an order for sale.

9.3 Accordingly the whole settlement agreement is illegal and void and the guarantee premised on it is also bad in law.

10. **The Bankrupcy Court Can Look Behind The Judgment**

10.1 It is admitted that the full facts of the transaction as disclosed in the above paragraphs were not raised in the civil suit commenced against the Judgment Debtor in Suit No.: D3-22-3570-98.

10.2 This had resulted in a Judgment being obtained by the Judgment Creditor as against the Judgment Debtor.

10.3 It is also a fact that a Notice of Appeal was filed by the Judgment Debtor to appeal as against the said Judgment obtained but this appeal was subsequently withdrawn.

10.4 However it is humbly submitted that the Bankruptcy Court can now still go behind the said Judgment so as to ensure that Justice is upheld at all material times.

10.5 The Judgment Debtor will make reference to the following cases in support of this contention:

(a) Case: *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn. Bhd*. [1990] 3 MLJ page 248 (Refer case No. 10 Bundle of Authorities).

PRINCIPLE: At Held 3 it was stated that the Court of Bankruptcy has the power at the instance of the Debtor himself to go behind the Judgment and to enquire into the validity of the debt even though the debtor has previously applied in the action to set-aside the Judgment and his application has been refused and affirmed on appeal.

(b) Case: *Supreme Finance (M) Bhd. v. Mohamad Noor (t/a Everway Food Centre) & Ors* [1993] 2 MLJ page 29)
(Refer case No. 11 Bundle of Authorities).

PRINCIPLE: This case reaffirmed the decision of *Re Sebastian* and held that the Bankruptcy Court can go behind the Judgment to enquire its validity.

(c) Case: *In re Beauchamp ex parte Beauchamp* Kings Bench Division Court of Appeal
(refer case No. 12 Bundle of Authorities).

PRINCIPLE: Court held that the Bankruptcy Court has the power on the hearing of a Bankruptcy petition founded on a Judgment Debt, to go behind the Judgment and inquire into the consideration for the Debt.

(d) Case: *In re Flatau, ex parte Scotch Whisky Distillers Limited* (Court of Appeal) Queens Bench Division (refer case No. 13 Bundle of Authorities).

PRINCIPLE: The Court held that in some cases the Court of Bankruptcy has gone behind a Judgment when it has been obtained by fraud, collusion or mistake.

(e) Case: *In re Fraser, ex parte Central Bank of London* (Court of Appeal) 2 QB page 633 (refer Case No. 14 Bundle of Authorities).

PRINCIPLE: In this case the Court held that the Court of Bankruptcy can go behind the Judgment and inquire whether notwithstanding the Judgment, there was a good debt. In so doing the Court of Bankruptcy does not set aside the Judgment. It goes round the Judgment and inquires into the subject matter.

(f) *The Law and Practice of Bankruptcy in Malaysia* by Khoo Kay Ping (refer case No. 15 Bundle of Authorities).

PRINCIPLE: At item 9 under the heading "Illegality" it is said that where the Judgment based on which the Bankruptcy Notice is issued is tainted with illegality, the Bankruptcy Notice may be set-aside.

(g) *Halsbury's Laws of England,* Fourth Edition Volume: 3 (Refer case No. 16 Bundle of Authorities).

PRINCIPLE: The textwriter has stressed that the Court is not necessarily bound by Judgment and may go behind the Judgment or order and may refuse to make a receiving order. Even where the appellate Court has refused to set aside the Judgment or order the Bankruptcy Court may still go behind it and inquire into the liability on which it is founded.

11. **This Honourable Court Will Not Enforce An Illegal Contract**

11.1 The Judgment Debtor humbly submits that it is a well entrenched principle that our Courts will not enforce an illegal contract.

11.2 In support of this principle the Judgment Debtor will make reference to the case of *Re An Arbitration Between Mahmoud and Ispahani.* Court of Appeal [1921] All ER at page 217 LJ Scrutton (Refer case No. 17 Bundle of Authorities).

PRINCIPLE: It was held that the Court is bound to not render assistance in enforcing an illegal contract, once it knows that a contract is illegal. The Court on its own volition will take the objection and refuse to enforce the contract.

11.3 A leading local case on the issue of illegality is the privy council case of *Keng Soon Finance Bhd. v. MK Ratnam Holdings Sdn. Bhd. & Anor Lord Oliver of Anylmerton* [1989] 1 MLJ 461. (Refer case No. 18 Bundle of Authorities.)

PRINCIPLE: At paragraph F to G at page 461 of the Judgment it was held as follows: "it is well established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is apprised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded for clearly, no Court could knowingly be party to the enforcement of an unlawful agreement".

11.4 The privy council case of *Kheng Soon Finance Bhd.* had made reference to the English decision of *Edler v. Auerbach* 1 KB page 359 (Refer case No. 19 Bundle of Authorities where Justice Devlin had this to say:

PRINCIPLE: It is well settled that an agreement may be unenforceable either because on the face of it, it cannot be performed without breaking the law, or because although capable of being performed legally it was made with the object of breaking the law.

12. **Material Non-disclosure In The Pleadings Filed By The Judgment Creditor In The Civil Suit**

12.1 The Judgment Debtor wishes to bring to the attention of this Honourable Court of the fact that the pleadings filed in the civil suit had failed to make a frank disclosure that there was an order for sale obtained to proceed for foreclosure action.

12.2 It is humbly submitted that the pleadings merely focused on the claim as against the Judgment Debtor/Guarantor without spelling out with precision from the out-set the chronology of events which had actually transpired. Accordingly there were vital informations which were concealed.

12.3 In this regard it is useful to refer to the very recent decision of our Apex Court in *Chee Pok Choy and 4 others v. Scotch Leasing Sdn. Bhd.* [2001] 2 CLJ 321 Justice Gopal Sri Ram (refer case no. 20 Bundle of Authorities) where he said as follows:

PRINCIPLE: The Court in this case held that the vital point to consider was whether the Respondent actively concealed matters from the Court when it applied for order for sale. The Court further held that a litigant moving the Court had to display *"uberrimae fides"*. The Respondent having actively practised a serious deception upon the Court ought not to benefit of the Judgment it had obtained. The Respondent should not be permitted to profit from the fraud it perpetrated on the Court.

The relevant paragraphs of the JC's submission

6. **Validity of BN**

The JD purports to submit at paragraph 2 of the JD's SUB, that the BN is invalid on the allegation that the JC has not served the judgment dated 27th April 1999 ("Judgment") with the request for the issue of the BN ("Request") on the JD.

With respect the JD's submission is without merit. Rule 92 of the Bankruptcy Rule 1969 ("the Rules") provides that all the creditor need to do is produce to the Registrar, an office copy of the judgment or order on which the bankruptcy notice is founded. Further the said rule only requires the filing of the Request.

Throughout the Rules, there are no provisions which require any judgment creditor to serve the judgment or order or even the request on the judgment debtor.

What is required to be served on the JD is only the BN.

Refer: Rule 92(c) and Rule 97 of the Rules

Service of the BN was effected through the order of this Honourable Court dated 19th April 2000 ("SS Order") and the JC has effected service of the BN in due compliance with the SS Order.

The case of *Raman Cheetiar v. Ledchumanan* [1939] MLJ Rep. p. 200 (Authority No. 1 of the JD) with respect does not support the JD's Sub at all.

In that case, the judgment creditor did not produce to the registrar of the court the office copy of the judgment with the request for the issue of the bankruptcy notice. The Court of Appeal by a majority held that such omission rendered the bankruptcy notice defective.

Here the JC did produce a certified true copy of the Judgment which was attached to the Request and filed the same with this Honourable Court. In fact, this Court has received the Judgment and Request and provided these documents with enclosure numbers of 1 and 2, respectively.

The JD's only complaint is that the judgment was not served on the JD.

As mentioned above, there is no requirement in the Rules to effect service of the Judgment let alone the Request on the JD.

The JD's reference to s. 76 of the Evidence Act 1950 is also without merit. In reply, the case of *Re Yau Kin Mun: ex. p Public Bank Berhad* [1999] 3 CLJ 412 (refer pg. 1 @ pg. 2 of Resp. Bundle of Authorities) aptly puts an end to the JD's submission on this subject:

"As the copy of the judgment produced to the registry has been certified true copy by the senior assistant registrar of the court, it qualifies as an "office copy" for the purpose of a request for the issue of the bankruptcy notice under r. 92(a) of the Bankruptcy Rules 1969. For such purpose, there are no provisions in the Bankruptcy Act or the Bankruptcy Rules that requires the copy of the judgment to be in accordance with s. 76 of the Evidence Act 1950."

Refer headnotes Held (1) and at page 501-502 of the decision.

The JD's reliance on the case of *Noliana Bte Sulaiman v. PP* is misconceived. Unlike the case before Your Lordship the case of *Noliana* is distinguishable in that, firstly, that was a criminal trial and secondly the parties sought to adduce evidence during trial, where the provisions of the Evidence Act 1950 would apply. Whereas, here the proceedings are conducted by affidavit evidence and Section 2 of the Evidence Act 1950 provides that the Act does not apply to affidavit evidence.

7. **Short Conclusion**

A perusal of the affidavit of service of Abdullah Bin Zabidi affirmed on 3/11/00 (Enclosure 9), it is clear from Exhibit 'AZ1', that due process of the BN together with the Request and the Judgment was in fact left at the JD's premises.

Clearly there is no merit on the JD's submission on this subject and accordingly humbly pray that this Honourable Court dismiss this aspect of the submission of the JD.

8. **Court not allowed to go behind the Judgment**

At paragraph 3 of the JD's SUB, the JD purports to invite this Honourable Court to go behind the Judgment. There is a dearth of authorities to conclusively state that the bankruptcy court cannot go behind the judgment. In support thereof, I will only refer this Honourable Court to the case of *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 (refer pg. 12 @ pg. 13 of Resp. Bundle of Authorities) where the Supreme Court held:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton*. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.

On this ground alone, this Honourable Court should dismiss the Appeal to Encl. 19 with costs.

The cases of *Re Sebastian* (Authority No. 10) and *Supreme Finance* (Authority No. 11) relied upon by the JD is with respect has been reached *per incuriam.* The Supreme Court decision of *Sovereign General* abovementioned was not cited in these two High Court decisions.

The JD sought to rely on views of the learned author in *"the Laws and Practice of Bankruptcy in Malaysia"* (Authority No. 15) to suggest that this court is empowered to set aside the BN if the judgment is tainted with illegality and quotes the case of *Re Sebastian* as authority.

With respect to the learned author, the Supreme Court decision of *Sovereign General* clearly lays down three instances in which a bankruptcy court may go behind the judgment, namely in the case of fraud, collusion or miscarriage of justice. Illegality is not one of them.

9. **No allegation of fraud or collusion or miscarriage of justice in obtaining the Judgment**

The JD makes no allegation of fraud or collusion or miscarriage of justice in obtaining the Judgment.

Refer:

Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ 155 @ 156 (refer pg. 12 @ pg. 13 of Resp. Bundle of Authorities).

Re: Flatau [1889] Vol. 22 QBD pg. 87 (refer Pg 77 @ pg. 78 of Resp. Bundle of Authorities).

As to what is meant by 'miscarriage of justice', regard should be had to the case of *Re: Howell* [1915] Vol. 84 LJRKB pg. 1399 @ pg. 1400 (refer pg. 74 @ pg. 75 of Resp. Bundle of Authorities), it was held:

> I have only been troubled in this case as to what is the meaning of the words 'miscarriage of justice' in *Flatau, In re* (22 QBD 83) I think that the working rule is that the Registrar can go behind the judgment where it is a judgment by default or compromise. He ought **not** to go behind it, when the judgment has been given in open court against a person who is **represented**. (emphasis added)

(Note: Both *Re Flatau* and *Re Howell* were referred to with approval in *Sovereign General*.)

Here the Judgment was obtained after an O. 14 hearing, wherein the JD was represented through counsel.

The JD herself through her own volition withdrew her appeal to judge in chambers against the Judgment.

Refer: Affidavit of Seow Swee Eng affirmed on 11/5/2001 paragraph 4.6 and 4.7 of the affidavit.

Surely the JD cannot now claim to have suffered a miscarriage of justice.

Further, if the JD and/or her counsel (in the civil suit) choose not to submit or proceed further against the Plaintiff's claim in the civil suit in which the Judgment is obtained, this on its own lends support to the submission that the JD has in fact admitted to the Judgment.

10. **Estoppel**

In the case before this Honourable Court, there is no allegation made disputing the validity of the Judgment. In fact what is being alleged are events which happened prior to the Judgment. The JD could have made the allegations now raised during the hearing of the summary judgment application, when Judgment was entered or even earlier when executing the Letter of Guarantee.

None was made at any material time. In fact the JD did take out an earlier application to set aside the BN in the form of Encl. 11, yet none of the allegations now made herein were produced in Encl. 11 which was subsequently withdrawn by the JD. In *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 (refer pg. 16 @ pg. 29 of Resp. Bundle of Authorities), Federal Court explained the application of the doctrine of estoppel and *inter alia* held that:

> The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract ... It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent ...

Applying the above principles of law to the facts herein, it is clear that by the JD's conduct of failing to pursue the allegation now made herein, in the earlier proceedings, the JD is estopped from raising all the allegations in the Bankruptcy proceedings.

Clearly the allegations now raised herein is an afterthought.

11. **Settlement Letter valid**

Be that as it may, to complete the submission, the JC will show further, why there are no merits in the JD's SUB.

11.1.1 **Brief Facts**

Pursuant to the JC's letters of offer dated 26/4/1996, 19/6/1996, 12/7/1996 and 12/8/1996 ("Settlement Letter") (refer to JD's affidavit affirmed on 5/6/2001 ("JD's AFD") exhibits "MMN-3") to one Marka Holdings Sdn. Bhd. ("Marka"), Judgment Creditor accepted as full and final settlement the sum of RM2,100,000.00 ("Settlement").

Incidentally Marka has since been wound up.

The redemption sum for the land held under title particulars, Lot 550 and 966 Mukim 7, District Province Wellesley South ("Land") was RM1,600,000.00 ("redemption sum") and not RM2,100,000.00 as submitted by the JD.

Refer: exhibit "MMN-3" page 84 of the JD's AFD.

The difference between the redemption sum and the Settlement in the sum of RM500,000.00 ("Guaranteed Sum") was secured by way of *inter alia* Letter of Guarantee executed by *inter alia* the JD referred to at exhibit "MMN-4" of the JD's AFD.

It is clear from the Letter of Guarantee that the JD was fully aware at all material times of all matters pertaining to the transaction, namely, in the recital to the Letter of Guarantee it states that the JD is fully aware of the foreclosure proceedings suit no. F185 of 1985 ("Foreclosure Action") prior to executing the Letter of Guarantee.

The redemption sum was received by the JC on 14/8/1996.

The residue of the Settlement was paid until Marka defaulted in the payment of the balance Settlement, in the sum of RM463,500.00 ("Outstanding Sum").

11.1.2 **Letter of Guarantee based on Guaranteed Sum**

It is clear that the JD agreed through the Letter of Guarantee to pay the Guaranteed Sum should Marka default.

There is clearly nothing illegal about the Letter of Guarantee as the consideration is valid and proper.

11.1.3 **JD's Complaint**

The JD makes no allegation that she was not aware of the Foreclosure Action when she executed the Letter of Guarantee and she makes no allegation that the Letter of Guarantee is invalid, hence there is no allegation of miscarriage of justice.

The only grievances of the JD in alleging that the Settlement Letter is illegal is that there is a pending order for sale dated 19th June 1996 ("Order for Sale") made pursuant to the Foreclosure Action and in light of the Order for Sale, it was illegal for the JC to enter into a separate agreement to allow Marka, the chargor/borrower to enter into a private treaty and to allow the discharge of the subject charge.

11.1.4 **JC's Submission in Reply**

With respect the JD's SUB, again is misconceived.

Neither the Rules of the High Court 1980 nor the National Land Code restricts the rights of the chargor or the chargee to enter into private treaty to discharge the charge/redeem the property which is subject to an order for sale. In fact in the Supreme Court decision of *Mui Bank Bhd. v Cheam Kim Yu (Beh Sai Ming Intervener)* [1992] MLJ 642 (refer pg. 36 of Resp. Bundle of Authorities) it was held that:

> Under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty but if such a sale is concluded as a purely business arrangement, it is for the chargee to discharge the charge to give full effect to the sale ...
>
> **Reading from the headnotes @ Held (2).**

The principles in the above case was again reaffirmed in the Federal Court decision of *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra Malaysia Berhad & 3 Ors* [1997] 3 CLJ 374 (refer p. 44 at p. 60 of Resp. Bundle of Authorities) where it was held:

> If a chargor can, at such a late stage, be entitled to a discharge, as a matter of logic, and speaking generally, there appears to be no reason why at an earlier stage a chargor's application to sell the charged land by private treaty so as to enable him to exercise his right of discharge, should be refused simply because proceedings for an order for sale has been commenced.

Here the redemption of the charged property was made with the consent of all parties including that of the JD.

The JD's reliance on the case of *Bank Pertanian Malaysia v. Bakar* (Authority no. 6) is with respect misconceived.

In that case the parties appealed against the order for sale made by the collector after they have entered into negotiations wherein the parties entered into a scheme of repayment.

Unlike that case, the facts before this court is dissimilar. Here the order for sale is made by the Court and further the property was redeemed after full payment of the redemption sum and only thereafter was the charge of the JC discharged.

Further the learned Judge in *Bank Pertanian* purported to quote the Federal Court decision in *Kimlin*. But with respect, the learned judge failed to quote from the Federal Court decision wherein it was held that the chargor/borrower possesses certain valuable rights and one of such right was the right to enter into private treaty and discharge the charge at any time even after the order for sale has been made.

Refer page 2375 @ para 20 and para 25 of *Kimlin* (refer pg. 58 of Resp. Bundle of Authorities).

12. Conclusion

There is nothing illegal about the Principal Letter/Agreement as alleged.

More importantly there is no allegation by the JD that the Letter of Guarantee is illegal save for the allegation that the Principal Letter/Agreement was illegal. The primary purpose of the Letter of Guarantee is to secure the repayment of the Guaranteed Sum.

In fact the basis of the Judgment against the JD is the Letter of Guarantee which is valid on all four corners of the document.

Further to date, the JD has not taken any steps to challenge the Judgment or the Letter of Guarantee or even the Principal Letter/Agreement through the proper civil procedure/process. By applying for declaration, the JD is seeking this court to give it aid in equity. One of the primary principles of equity is that the Court will not lend its hand to the indolent but only to the vigilant.

It is now not open to the JD to purportedly challenge the Judgment or the Letter of Guarantee or even the Principal Letter/Agreement through this Bankruptcy proceedings.

For the reasons aforementioned, it is humbly submitted that the JD's SUB has failed to disclose any merits in its arguments and humbly pray that the decision of the learned Registrar given on 5th September 2001 is affirmed and that the Appeals are dismissed with cost.

The Issues

These may be distilled down to only two. They are considered below.

Issue One

Whether the bankruptcy notice was invalid by reason that no office copy of the judgment order was produced when the request for the issue of the said notice was made before the court.

A judgment creditor applying for the issuance of a judgment notice is required to comply with r. 92 of the Bankruptcy Rules 1969 which states as follows:

> 92. **Issue of notice**
>
> When applying for the issue of a bankruptcy notice, the creditor shall:
>
> (a) produce to the Registrar an office copy of the judgment or order on which the notice is founded;
>
> (b) file the notice, together with a request for issue;
>
> (c) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.

In determining whether the JD is entitled to have the judgment notice set aside by reason of the failure of the JC to comply with the said rule, the court would have to examine and interpret the purpose of r. 92.

Rule 92, it can be readily perceived, serves the purpose of providing the registrar with the means to verify the existence of a judgment and to satisfy him that it was in order to issue the bankruptcy notice. The registrar's duty at this stage is therefore purely perfunctory in nature.

Rule 92 it is clear is made purely for his administrative convenience. It only imposes upon the JC to provide him with an office copy of the judgment order in order to satisfy him that such a judgment exists that would entitle the JC to issue the bankruptcy notice.

It does not impose upon him to accept only an office copy of the judgment order or for that matter any order. He is at liberty to accept any form of evidence that may be produced by the JC to show that a monetary judgment had in fact been made against the JD. He is bound to issue the bankruptcy notice if he is satisfied that the JC had obtained a judgment sum of the statutory minimum sufficient to issue a bankruptcy notice.

Once the registrar has issued the bankruptcy notice the JD may only apply to set aside the notice only if he can show that no such judgment order had been made against him. He is not entitled to have the judgment notice set aside merely by pointing to some procedural defects in the application or in the issuance of the notice (as the JD had done in this case) without showing that no such judgment had been issued against him.

Unless the JD can show that no such judgment had been obtained, her appeal on this ground must fail.

Issue Two

Whether the court in dealing with the JD's application to set aside the bankruptcy order can go behind the judgment

I would agree entirely with the submission of counsel for the petitioner that the authority on point is *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ 155; ([1988] 1 CLJ (Rep) 277) at p. 156 (p. 278) wherein the Supreme Court (per Lee Hun Hoe CJ) held that:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton*. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under section 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. Having regard to these provisions, it was wrong for the learned judge to strike out the creditors' petition.

Further down on the same page of the judgment, the Supreme Court had made it clear that:

> An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp*. As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau; Re Howell*.

The judgment that was entered against the JD in the instant case was obtained after a hearing under O. 14 and was perfectly regular in all respects. The judgment was obtained on the merit and the JD did not lodge an appeal. It was not obtained by fraud, collusion or through a miscarriage of justice.

So was the settlement agreement that the principal debtor Marka Holdings Sdn. Bhd. had entered into with the JC. There was nothing illegal about it. It is clear that the settlement was in respect of a larger sum that the Marka Holdings would have to pay. Given that the settlement agreement between Marka Holdings and the JC was *prima facie* legal, I do not think that a bankruptcy court ought to look beyond that agreement to determine whether there were elements of illegality which would enable the JD in the instant case to avoid her obligation under the guarantee.

A bankruptcy court is least equipped by the very nature of the summary nature of its proceedings to conduct a detailed inquiry into the propriety of the judgment obtained against the JD beyond satisfying itself that *prima facie* that judgment was regular.

The task of challenging the legality of a judgment should be undertaken in another forum by an application to set aside the judgment. The JD should only apply to set aside or in the alternative for an order of annulment of the bankruptcy order only after successfully setting aside the judgment in that forum.